CLARENCE AND MARGUERITE ZUSPANN
G. H. TANNER

IBLA 74-321 Decided November 7, 1974

Appeals from decisions of the Montana State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease M 25014-F Acq., and a request for approval of assignment of the lease.

Affirmed.

1. Oil and Gas Leases: Assignments or Transfers -- Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals

It is proper to deny a petition for reinstatement of an oil and gas lease, terminated for failure to pay the annual rental when due, where petitioners, as the record title holders of the lease, attribute the fault for the late payment to their assignee, who in taking the assignment had agreed to make the rental payment. Petitioners, as assignors, are responsible for the performance of all obligations under the lease until an assignment of the lease is approved. In these circumstances, petitioners did not exercise reasonable diligence; nor was their failure to pay the rental timely shown to be justifiable.

2. Oil and Gas Leases: Assignments or Transfers

It is proper to deny a request for approval of an assignment of an oil and gas lease where the lease had terminated for failure to pay the annual rental timely. Even though the assignee attributes his late rental payment to the Bureau of Land Management's failure to approve the assignment before the termination

> of the lease, in which case he assertedly would have had record title to the lease and ample time and reason to set up records for rental paying purposes, these facts do not afford an adequate basis for relief.

APPEARANCES: Raymond K. Peete, Esq., Anderson, Symmes, Forbes, Peete & Brown, Billings, Montana, for appellants Clarence and Marguerite Zuspann. G. H. Tanner, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Clarence and Marguerite Zuspann have appealed from the May 20, 1974, decision of the Montana State Office, Bureau of Land Management, denying their petition for reinstatement of oil and gas lease M 25014-F which terminated by operation of law upon appellants' failure to pay the annual rental on or before the due date of May 1, 1974, as required by 30 U.S.C. § 188(b) (1970).

As a sequel to its denial of reinstatement of the lease, the Montana State Office, by decision of May 21, 1974, denied a request for approval of an assignment of the lease from the Zuspanns to G. H. Tanner for the reason that there was no lease to assign as the lease had terminated on May 1, 1974. G. H. Tanner has appealed to this Board from this decision.

Our primary concern here is whether or not the denial of the petition for reinstatement of the lease is correct for, if so, it follows that the denial of the request for approval of the assignment is also correct.

The assignment from the Zuspanns to Tanner was filed by Tanner in the State Office on March 27, 1974, together with his request for its approval. Rental in the amount of $320 was due on or before May 1, 1974, but was not received by the Bureau until May 9, 1974. The record indicates that the remitter was G. H. Tanner.

The Bureau issued a termination notice on May 10, 1974, in which the Zuspanns were informed of their right to petition for reinstatement of the lease if they could show that their failure to pay the rental timely was either justifiable or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1970). Appellants Zuspann filed a timely petition for reinstatement of the lease. They alleged that on March 19, 1974, they assigned the lease to Tanner who pursuant to an agreement with the Zuspanns was to have kept the lease in force by paying the rental before same became delinquent; that they had no notice or knowledge that the rent due by May 1, 1974, had not been paid until they received the termination notice; and that immediately after receipt of the termination notice they contacted Tanner

who advised them that the check had been inadvertently held in his office although it had been prepared for mailing prior to the time the rent was due and that it was an unintentional error in his office that delayed the mailing of the check.

The Bureau failed to find that the late payment was justifiable, and denied the petition for reinstatement because they could not find that reasonable diligence was exercised in maintaining the lease account in good standing.

In their appeal, Mr. and Mrs. Zuspann reiterate the allegations made in their petition for reinstatement. They further state they had a right to rely on their agreement with Mr. Tanner that he would be responsible for the payment of any future rentals, and assert that the lack of due diligence on the part of Tanner should not be imputed to them. In support of this assertion, they cite the case of Pan American Petroleum Corp. v. Gibbons, 168 F. Supp. 867 (D. Utah, 1958).

In his appeal, Tanner argues that the assignment should have been approved March 27, 1974, 1/ effective April 1, 1974, which constitutes normal procedure and, had this been done, he would have had record title to the lease and ample time and reason to set up records for rental paying purposes. He concludes that, through no fault of his, the assignment was not approved during the normal time, which resulted in unwarranted adverse decisions to all parties concerned.

[1] The Bureau's decision denying reinstatement of the lease is correct. Reinstatement may be allowed where the lessee can demonstrate that the failure to pay the full amount of the rental when due was either justifiable or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1970). Reasonable diligence is established where it is shown that the payment was mailed in sufficient time so that in the normal course of events it would have been received on or before the due date. Charmaine Bowers, 16 IBLA 204 (1974); Louis Samuel, 8 IBLA 268 (1972).

We find that reasonable diligence was not exercised in the instant case. We note that Tanner remitted the payment received in the Montana State Office on May 9, 1974. Although the record is silent as to when the payment was mailed, the very tenor of Tanner's appeal is a tacit admission that he was late in mailing it. Neither did the Zuspanns exercise reasonable diligence in assuring themselves that the rental was timely paid. The assignor continues to be responsible for the performance of all obligations under the lease until an assignment of the lease is approved. 30 U.S.C. § 187a (1970); Amoco Production Co., 16 IBLA 215, 220 (1974); Duncan Miller,

1/ The same day on which the assignment and request for its approval were filed in the Utah State Office.

12 IBLA 201, 203 (1973); Lester C. Hotchkiss, A-27342 (August 14, 1956). Therefore, it was the responsibility of the Zuspanns, as the lessees of record at the time the rental payment became due, to assure timely payment of the rental, either by making payment themselves or by making sure that Tanner paid it.

Nor do we find that the late payment was "justifiable." This Board has held that failure to pay the rental on time is "justifiable" when there is a factor beyond the control of the lessee which is the cause of the late payment. Vern H. Bolinder, 17 IBLA 9, 11 (1974), and cases cited. The Zuspanns' reliance on Tanner to pay the rental is not a justifiable excuse. It cannot absolve them from their responsibility for the performance of all obligations under the lease, including timely payment of rentals when due, until such time as the assignment is approved by the Bureau. Cf. W. R. Murfin, 13 IBLA 97 (1973), in which this Board affirmed a Bureau decision denying approval of assignments of oil and gas leases terminated by operation of law for failure to make rental payments, where both the assignor and the assignee apparently assumed that the other would make the rental payments. Also cf. Duncan Miller, 12 IBLA 201 (1973).

Pan American Petroleum Corp. v. Gibbons, supra, 2/ cited by the Zuspanns, does not support their contention that the lack of reasonable diligence on Tanner's part should not be imputed to them by the Bureau. In essence, the court held that as between the assignor and assignee of Federal leases the assignee is primarily responsible for payment of rent even though the assignment has not been approved by the Government. This is all well and good as between the private parties. However, the Government was neither involved nor made a party to the case. Pan American had sued Gibbons to recover accrued rentals which it had paid to the Bureau of Land Management on five oil and gas leases theretofore assigned by it to Gibbons. Pan American assigned the leases to Gibbons in February 1956, but he failed to file the assignments with the Bureau of Land Management for approval. Because of the termination as of March 1, 1956, of the unit agreement covering them, the terms of the leases were automatically extended for a period of two years; otherwise their terms would have expired during the summer or fall of 1956. Rentals for the sixth year of the leases fell due in that period, and Pan American, as the lessee of record, received demands for and paid the rentals to the Bureau of Land Management under protest. 3/

2/ Aff'd sub nom Gibbons v. Pan American Petroleum Corp., 262 F.2d 852 (10th Cir. 1958).

3/ The leases were issued prior to the Act of July 29, 1954, 68 Stat. 585, which provided for automatic termination of leases by operation of law upon failure of a lessee to pay rental on or before the anniversary date of the lease, 30 U.S.C. § 188(b) (1970). Unpaid rentals on leases issued before this act became a debt due the United States.

Appellants Zuspann quote at length passages from Pan American, portions of which we quote (with emphasis added) as follows:

> It does not follow that the assignments as between the assignor and assignee were not effective before formal approval by the Government. * * * All we need concern ourselves with here is that an absolute assignment was made without qualification and with immediate effect as between the parties, * * * At p. 872.

> A lessee will be released by act of the lessor in accepting and substituting the assignee in place of the lessor, but even though there is no such substitution, an assignee becomes primarily responsible for the payment of rent as between assignor and assignee. * * * At p. 873.

The following additional statements in the Court's opinion in Pan American have a bearing on its decision:

> * * * Without such approval [of the assignments by the Bureau of Land Management], the Government could still look to the plaintiff [Pan American] as the one primarily, or perhaps solely, liable for rentals as far as the Government was concerned. * * * But certainly, without the approval of the assignments by the Government, the plaintiff would not be fully released. At p. 872.

Therefore, in giving judgment to plaintiff Pan American for recovery from Gibbons of the rentals paid to the Bureau of Land Management, the Court, in effect, held that until an assignment of a lease is approved the Government may hold the lessee of record responsible for payment of rental but that the assignment is effective and binding as between the assignor and assignee. The Court's decision does not support the Zuspanns' contention in the instant case insofar as the Government is concerned.

[2] We now turn to appellant Tanner's argument that the assignment should have been approved March 27, 1974, effective April 1, 1974, which is normal procedure and, if this had been done, he would have had record title to the lease and ample time and reason to set up records for rental paying purposes. This argument has a hollow ring and is lacking in merit. We do not understand why his taking of the assignment from the Zuspanns, in itself, was not an ample reason to set up a record for rental paying purposes without waiting for the Bureau's approval of the assignment. This is especially true when he knew that he was responsible to his assignors for timely pay-

ment of the rental. His excuse does not justify his failure to pay the rental on time. Accordingly, we hold that the Bureau's denial of his request for approval of the assignment for the reason that the lease had terminated on May 1, 1974, is correct.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Martin Ritvo
Administrative Judge